

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

SLEEPING TIGER, LLC, a Washington limited
liability company,

Petitioner,

v.

CITY OF TUKWILA, a municipal corporation,

Respondent.

CASE NO. 11-3-0005

ORDER ON MOTIONS

This matter comes before the Board on two dispositive motions, one filed by the City of Tukwila seeking dismissal of the matter in its entirety and one filed by Sleeping Tiger LLC requesting a finding of non-compliance and the imposition of invalidity.¹ Objections and replies were received in regards to these motions.²

In addition, Tukwila filed a Motion to Supplement the Record.³ The Board received no objections from Sleeping Tiger as to this motion. Tukwila also filed declarations with attachments to support its dispositive motion as well as its motion to supplement.⁴ Likewise, Sleeping Tiger filed a declaration with attachments in support of its response to Tukwila's Motion to Dismiss.⁵

¹ Tukwila's Motion to Dismiss Petition for Review, Filed April 6, 2011; Sleeping Tiger's Dispositive Motion for Summary Judgment, Filed March 8, 2011

² Tukwila's Response to Sleeping Tiger's Dispositive Motion, Filed April 13, 2011; Sleeping Tiger's Brief in Opposition to Tukwila's Motion to Dismiss Petition for Review, Filed April 13, 2011; Tukwila's Reply on Motion to Dismiss Petition for Review, Filed April 20, 2011

³ City of Tukwila's Motion to Supplement the Record, Filed April 6, 2011

⁴ Declaration of Michael Kenyon in Support of City of Tukwila's Motion to Supplement the Record with attachments, Filed April 6, 2011; Declaration of Bob Sterbank in Support of City of Tukwila's Reply on Motion to Dismiss Petition for Review, Filed April 20, 2011

⁵ Declaration of William C. Summers in Support of Sleeping Tiger's Brief in Opposition to Tukwila's Motion to Dismiss Petition for Review, Filed April 13, 2011.

1 **I. MOTION TO SUPPLEMENT THE RECORD and SUPPORTING DECLARATIONS**

2 Applicable Law

3 RCW 36.70A.290 (4) provides:

4 The board shall base its decision on the record developed by the city, county,
5 or the state and supplemented with additional evidence if the board determines
6 that such additional evidence would be necessary or of substantial assistance
7 to the board in reaching its decision.

8 **With its Motion to Supplement**, the City requests three additional documents be added to
9 the Record:

- 10 1) Committee of the Whole Minutes from February 28, 2011 (Exhibit A)
11 2) Sleeping Tiger, LLC's LUPA Petition filed March 3, 2011 (Exhibit B)
12 3) February 4, 2011 E-Mail from Amnon Shoenfeld to Brandon Miles (Exhibit C)
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14 The Board first notes that all of the proposed exhibits were created after January 3, 2011,
15 the date the challenged action – Ordinance 2321 – was adopted. Since the Board's review
16 is generally limited to the information that was before the decision-makers at the time of
17 adoption, documents generated after the enactment of the challenged ordinance are seldom
18 admitted because these documents simply were not before the decision-makers.⁶

19 However, the GMA provides that a moratorium or interim zoning control can be adopted
20 without a prior public hearing, so long as a public hearing is held within at least sixty days of
21 adoption.⁷ Further, the moratorium "may be effective for not longer than six months, but
22 may be effective for up to one year if a work plan is developed for related studies providing
23 for such longer period."⁸ With this in mind, the Board reviews the proposed exhibits:
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31 ⁶ See e.g. *Keesling v. King County*, CPSGMHB Case 06-3-0035, Order on Motions at 3 (Feb. 28, 2007);
32 *Cave/Cowan v. Renton*, CPSGMHB Case 07-3-0012, Order on Motions at 5 (April 30, 2007)

⁷ RCW 36.70A.390

⁸ RCW 36.70A.390

1 • **Exhibit A: Minutes of February 28 Council Meeting**

2 The City asserts these minutes had not been approved by the Council at the time of the
3 preparation of the Index of the Record. The minutes reflect the City Council's direction to
4 staff to begin work "with the Planning Commission to conduct the MIC comments review and
5 public hearing process"⁹ rather than incur further delay by adopting a Community Affairs and
6 Parks Committee recommendation to first conduct a "stakeholder committee process."¹⁰
7 The Board finds the information in the minutes may be necessary as to Tukwila's action in
8 conformance with the moratorium statute. Exhibit A is **granted**.

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11 • **Exhibit B: LUPA Petition**

12 The City asserts Sleeping Tiger's LUPA Petition to be of value to the Board in making a
13 determination in the case because it demonstrates Sleeping Tiger's intent.¹¹ The Board
14 views the LUPA action as a separate and distinct action based not on the GMA, with the
15 Board not a party, and in a separate jurisdictional venue. Exhibit B is **denied**.

17 • **Exhibit C: E-mail communication**

18 The City asserts the email interchange between Amnon Shoenfeld¹² to Brandon Miles,¹³
19 written previous to the filing of the Petition for Review, would be of value because it shows
20 Shoenfeld advising that King County has "not awarded a plan or contract for anyone to
21 operate a CDF in Tukwila, and there are no plans for another facility in the future."¹⁴ The
22 Board finds the email was exchanged subsequent to adoption of the challenged ordinance
23 and was not before the decisions-makers. It offers no definitive policy documentation.
24 Exhibit C is **denied**.

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29 ⁹ Motion to Supplement at 1-2, citing February 28 Minutes at 5

30 ¹⁰ Motion to Supplement, at 1-2, citing February 28 Minutes at 5

31 ¹¹ Motion to Supplement, at 2

32 ¹² Mr. Shoenfeld is the Division Director for King County's DCHS/Mental Health, Chemical Abuse, and
 Dependency Services Division

¹³ Mr. Miles is a Senior Planner with Tukwila's Department of Community Development.

¹⁴ Motion to Supplement, Email Correspondence (dated Feb 4, 2011)

1 In addition, both parties submitted **declarations with attachments in support of their**
2 **briefing**. The Board reviews the evidence submitted in relationship to these declarations as
3 it does other supplemental evidence.
4

5 • **Sleeping Tiger's Declaration**

6 Petitioner submitted the Declaration of William C. Summers which included several
7 newspaper articles in conjunction to its opposition to the City's Motion to Dismiss. Even with
8 a properly filed motion to supplement, the Board generally does not permit the inclusion of
9 newspaper articles¹⁵ and, therefore, the use of these exhibits by Sleeping Tiger is **denied**.
10 Any reference to these exhibits within Sleeping Tiger's briefing will be disregarded by the
11 Board.
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14 • **Tukwila's Declarations**

15 Tukwila submitted two declarations – Kenyon Declaration and Sterbank Declaration. The
16 Kenyon Declaration was submitted in conjunction with Tukwila's Motion to Supplement and
17 the Board has addressed it *supra*. The Sterbank Declaration was submitted in relationship
18 to the City's Reply on its Motion to Dismiss and includes copies of amendments to
19 Downtown Emergency Services Center's (DESC) contract with King County and Seattle
20 Planning Department's permitting activity for the DESC facility on Lane Street. Although
21 these documents reveal the commencement of development on a DESC facility in Seattle,
22 they have no relevance to the issue presented to the Board in these proceedings, that being
23 whether Tukwila is in violation of the GMA's goals and requirements, specifically in regards
24 to Essential Public Facilities. The use of these exhibits by Tukwila is **denied**. Any
25 reference to these exhibits within Tukwila's briefing will be disregarded by the Board.
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31 ¹⁵ See e.g. *Keesling v. King County*, CPSGMHB Case 07-3-0017, Final Decision and Order at 4 (Sept. 25,
32 2007); *Wold et al v City of Poulsbo*, CPSGMHB Case No. 00-3-0005c, Order on Motions to Supplement the
Record (May 11, 2010), at 7 (The Board is "skeptical about the accuracy or probative value of newspaper
reports.")

1 Participation Standing: Tukwila asserts Sleeping Tiger did not participate in the adoption of
2 the challenged ordinance.¹⁸ RCW 36.70A.280(2)(b) grants standing to a person who
3 participated orally or in writing before the city regarding the matter on which a review is
4 being requested. RCW 36.70A.280(4) further provides that to establish participation
5 standing, Sleeping Tiger must show that its participation was reasonably related to the issue
6 as presented to the Board in the PFR.
7

8 The Board notes Sleeping Tiger does not rely on participation standing within its PFR, it
9 relies only on APA Standing.¹⁹ Therefore, the Board finds no merit in Tukwila's motion to
10 dismiss on this basis.
11

12 APA Standing: Tukwila contends Sleeping Tigers fails to satisfy the requirements for APA
13 standing, namely failing to demonstrate prejudice.²⁰ RCW 34.05.530 sets the parameters
14 for APA standing, with all required to be satisfied: (Emphasis added)
15

16 A person has standing to obtain judicial review of agency action if that person
17 is aggrieved or adversely affected by the agency action. A person is aggrieved
18 or adversely affected within the meaning of this section *only when all three of*
19 *the following conditions are present:*

20 (1) The agency action has *prejudiced or is likely to prejudice* that person;

21 (2) That person's asserted *interests are among those that the agency was*
22 *required to consider* when it engaged in the agency action challenged; and

23 (3) A *judgment in favor of that person would substantially eliminate or redress*
24 *the prejudice* to that person caused or likely to be caused by the agency
25 action.

26 The City argues Ordinance 2321 does not preclude the siting of a crisis diversion facility or
27 an EPF, in and of itself, it simply extends a previously enacted moratorium.²¹ In addition,
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29 ¹⁸ Tukwila's Motion to Dismiss at 6. In response, Sleeping Tiger acknowledges it did not participate in the
30 process during the formulation of Ordinance 2321, but contends its extensive participation before the City in
31 relationship to its previous action before the Board (CPSGMB Case 10-3-0008) is "intricately related" and
32 "reasonably related" so as to effectively support standing in these proceedings. *Sleeping Tiger's Opposition*, at
7-8

¹⁹ PFR, Section 3

²⁰ Tukwila's Motion to Dismiss at 6

1 Tukwila points out that the Ordinance temporarily limits applications for non-industrial uses
2 in only one of eight commercial zones in the City, thus EPFs are not precluded within the
3 City.²² According to Tukwila, the temporary nature of the challenged action does not
4 constitute prejudice or likely prejudice necessary to confer standing.

5
6 In response, Sleeping Tiger argues it satisfies all of the requirements for APA standing
7 because the application of the moratorium “unquestionably prejudiced” the Unclassified Use
8 Permit it sought. Sleeping Tiger further asserts its interests were required to be considered
9 by Tukwila and that a decision in its favor, especially invalidation, would provide redress.²³
10

11 Tukwila does not dispute Sleeping Tiger’s claims as to its interests, it is only prejudice that it
12 contends is lacking. The Board sees this prejudice as grounded in the City’s denial of
13 Sleeping Tiger’s application for an Unclassified Use Permit due to the application of the
14 moratorium put into effect by Ordinance 2321. This denial sufficiently demonstrates that
15 Sleeping Tiger will suffer in a particular way, that is, it will not be able to proceed in its desire
16 to develop its property.²⁴ In addition, since the GMA grants the Board authority to find non-
17 compliance and, in appropriate situations, invalidate legislative enactments, a remedy is
18 available that would redress this prejudice. Therefore, the Board finds Sleeping Tiger has
19 sufficiently demonstrated APA standing under the facts of this matter.
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23 • **Lack of Board Jurisdiction over Project Permit Decisions**

24 Tukwila asserts that because Sleeping Tiger applied for an Unclassified Use Permit, the
25 Board does not have jurisdiction over a project permit decision. Tukwila cites RCW
26 36.70A.280(1), which it contends limits the Board to the review of comprehensive plans and
27 development regulations and related amendments.²⁵
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30 ²¹ Tukwila’s Motion to Dismiss, at 7

31 ²² Tukwila’s Motion to Dismiss, at 7

32 ²³ Sleeping Tiger’s Opposition, at 8

²⁴ Further, Sleeping Tiger has provided evidence that **timely** availability of the permit may be essential to its securing the project.

²⁵ Tukwila Motion to Dismiss, at 9

1 Tukwila asserts that Sleeping Tiger, in its Motion to Dismiss, acknowledges it is seeking a
2 permitting decision from the City.²⁶ Tukwila points to the Petition for Review where
3 Sleeping Tiger expressly stated “that a decision by the Board in ST’s favor ‘would eliminate
4 or redress the prejudice to it in this case by requiring the City of Tukwila to process its
5 Application for an Unclassified Use Permit, which is necessary in order to site crisis
6 diversion facilities on its property’”.²⁷ Finally the City contends, by virtue of filing a LUPA
7 appeal in King County Superior Court challenging the same permit decision, it is clear that
8 what Sleeping Tiger seeks is a permit for which the Board lacks jurisdiction.
9

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11 Tukwila is correct in that RCW 36.70A.280 and 36.70A.290 limits the Board’s review to
12 comprehensive plans, development regulations, and related amendments. This limitation
13 has been expressly noted by courts, including the Supreme Court in *Woods v. Kittitas*
14 *County*.²⁸

15 GMHBs have limited jurisdiction to decide only petitions challenging
16 comprehensive plans, development regulations, or permanent amendments to
17 comprehensive plans or development regulations ... GMHBs do not have
18 jurisdiction to decide challenges to site-specific land use decisions because
19 site-specific land use decisions do not qualify as comprehensive plans or
20 development regulations. A challenge to a site-specific land use decision
should be brought in a LUPA petition at superior court.

21 Sleeping Tiger acknowledges the Board has limited review and that permits are not within
22 its review authority.²⁹ However, Sleeping Tiger argues the basis for this case is the
23 adoption of the MIC moratorium and not the rejection of the permit application.³⁰ Sleeping
24 Tiger further asserts that if the moratorium were not in place, the Unclassified Use Permit
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30 ²⁶ Tukwila’s Motion to Dismiss, at 9-10

31 ²⁷ Tukwila’s Motion to Dismiss, at 9(citing PFR at 3)

32 ²⁸ *Woods v. Kittitas County*, 162 Wn.2d 597, 609-610 (2007)(citing *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000)) (Internal citations omitted)

²⁹ Sleeping Tiger Brief in Opposition, at 9

³⁰ Sleeping Tiger Brief in Opposition, 5 and 9

1 would have been processed. Lastly, Sleeping Tiger asserts the moratorium is a
2 development regulation subject to the Board's jurisdiction.³¹

3
4 As Sleeping Tiger correctly notes, the Board has previously found a moratorium can
5 constitute a development regulation under the GMA in certain situations.³² But, based on
6 the briefing and the facts of this case, it is the *City's interpretation and application* of the
7 moratorium to a *site-specific project permit* that underlies Sleeping Tiger's challenge. This
8 is demonstrated throughout the briefing and in the PFR where Sleeping Tiger acknowledges
9 it filed a project permit application for an Unclassified Use Permit and it is the processing of
10 that permit it seeks in redress. Regardless of all other arguments related to other issues,
11 the Board cannot review applications for project permits; that is the province of the superior
12 court under a LUPA appeal, which Sleeping Tiger currently has pending in King County
13 Superior Court. Therefore, the Board concludes the City of Tukwila rejected a site-specific
14 permit application which the Board has no jurisdiction to review. Tukwila's Motion to
15 Dismiss is **granted**.
16
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18 It should be noted the Board acknowledges the City has had its moratorium in place for an
19 extended period of time, since February 2010. Therefore, any subsequent challenges
20 received by the Board will result in a careful analysis as to the reasons for any extension of
21 this moratorium.
22

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24 • **Substantive Review of Moratoria**

25 In its Motion to Dismiss, Tukwila also argues that it procedurally complied with RCW
26 36.70A.390, dealing with moratorium provisions and that Sleeping Tiger did not challenge
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32 ³¹ Sleeping Tiger Brief in Opposition, at 3

³² See e.g. *DOC v. City of Lakewood*, CPSGMHB Case 05-3-0043, Final Decision and Order, at 13 (Jan. 31, 2006)

1 the procedure in their motion. However, since the Board finds it lacks jurisdiction in this
2 matter, the Board will not issue an opinion as to this assertion.³³

3 4 III. SLEEPING TIGER'S MOTION FOR SUMMARY JUDGMENT

5 Sleeping Tiger moves for summary judgment, asking the Board to rule, as a matter of law,
6 that "Tukwila's MIC moratorium, as applied by the City, precluded the siting of essential
7 public facilities in violation of its obligations under the GMA."³⁴ As provided *supra*, the
8 Board has determined that it lacks subject matter jurisdiction in this matter and therefore,
9 Sleeping Tiger's motion must be **denied**.
10

11 12 IV. ORDER

13 Based upon review of the GMA, Board's Rules of Practice and Procedure, briefing and
14 exhibits submitted by the parties, case law and prior decisions of the Board and having
15 deliberated on the matter, the Board enters the following Order:
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17 A. Supplementation of the Record:

- 18 1. Tukwila's Motion to Supplement the Record is **granted in part, denied in part**.

19 As attached to the Declaration of Kenyon, Exhibit A, February 28, 2011 City
20 Council Minutes is admitted. Exhibit B, Sleeping Tiger's LUPA petition, and
21 Exhibit C, February 4, 2011 Email communication, are both denied.
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- 23 2. Attachments to Tukwila's Declaration of Sterbank are **denied**.

- 24 3. Attachments to Sleeping Tiger's Declaration of Summers are **denied**.
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26 B. Motions to Dismiss:

- 27 1. Tukwila's Motion to Dismiss, based on subject matter jurisdiction, is **granted**.
28 2. Due to the lack of jurisdiction, Sleeping Tiger's Motion to Dismiss for Summary
29 Judgment is **denied**.
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31 ³³ RCW 36.70A.290 precludes the Board from entering advisory opinions. Without jurisdiction, the Board
32 would be doing just that.

³⁴ Sleeping Tiger Motion, at 12

1 Therefore, the Petition for Review in *Sleeping Tiger v. City of Tukwila* is **dismissed** and
2 CPSGMHB Case No. 11-3-0005 is **closed**.

3
4 Dated this 6th day of May, 2011.

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Dave Earling, Board Member

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Margaret Pageler, Board Member

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Nina Carter, Board Member

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14 Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party
15 files a motion for reconsideration pursuant to WAC 242-02-832.³⁵
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20 _____
21 ³⁵ Pursuant to RCW 36.70A.300 this is a final order of the Board.

22 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to
23 file a motion for reconsideration. The original and four copies of a motion for reconsideration, together with any
24 argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original
25 and four copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of
26 record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240,
WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial
review.

27 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the decision to superior court
28 as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in
29 superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil
30 Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on
31 the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as
32 provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the
Board means actual receipt of the document at the Board office within thirty days after service of the final order. A
petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)